IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DENISE SONIA P PANGELINAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00070-1

BRIEF OF RESPONDENT

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SERVICE	Lisa Elizabeth Tabbut Po Box 1319 Winthrop, Wa 98862-3004 Email: ltabbutlaw@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 9, 2017, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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1. Whether the trial court erred in considering the actual facts of the victim's injuries where Pangelinan stipulated that an exceptional sentence is necessary in the interests of justice and admitted that she caused injuries that substantially exceed the level of bodily harm necessary to prove the offense?

(a) Whether defense counsel was ineffective for not objecting to the trial court's consideration of the actual facts of the victim's injury?

2. Whether the matter should be remanded with orders to strike the forfeiture provision of the judgment and sentence (CONCESSION OF ERROR)?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY AND FACTS[1]

Denise Sonia P Pangelinan was charged by a first amended information filed in Kitsap County Superior Court with vehicular assault (RCW 46.61.502). CP 1. The charge included a special allegation that Pangelinan had caused injuries that "substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." CP 2.

[1] No document in the record recites all the facts of the incident. The present issue can be resolved on the record of the procedures in the case that include Pangelinan's factual statement and the facts the trial court heard at sentencing.

Less than two weeks after the filing of the amended information, with assistance of counsel, Pangelinan signed a plea agreement. CP 5-10. That document recited that the standard range for the offense is 3-9 months. CP 5. That document included two stipulations: First, Pangelinan agreed that "[t]he parties stipulate that the sentencing court may consider the discovery and/or certification(s) for probable cause as the material facts." CP 6. Second, the plea agreement recited that

> x Agreed Exceptional Sentence- The Parties stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, that they will recommend the following exceptional sentence provisions, and that a factual basis exists for this exceptional sentence, predicated upon *In re Breedlove*, 138 Wn.2d 298 (1999) and *State v. Hilvard*, 63 Wn.App. 413 (1991), *review denied*, 1 18 Wn.2d 1025 (1992). RCW 9.94A.421(3) and RCW 9.94A.535: EXCEPTIONAL ABOVE THE STANDARD RANGE- 24 MONTHS.

CP 7. Among the provisions in the plea agreement, Pangelinan also agreed that "[t]he Defendant understands that if the parties agree to an exceptional sentence, the Defendant is waiving the right to have facts supporting such a sentence decided by a jury." CP 9. Finally, she acknowledged that her entry into the agreement was free and voluntary and that her attorney had explained all the provisions to her. CP 9.

Pangelinan signed a Statement of Defendant on Plea of Guilty to Non-sex Offense. CP 11. Therein, she was advised that

> (h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless the judge finds substantial and compelling reasons not to do so. I understand the following regarding exceptional sentences:
>
> (i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.
>
> (ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.
>
> (iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.
>
> (iv) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

CP 14. In paragraph 11 of the plea document, Pangelinan stated that

> On or about 11/19/15 in Kitsap County I did operate a vehicle while under the influence of an intoxicating drug and caused substantial bodily harm to another. Additionally, the victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.

CP 19. Here, again, Pangelinan asserted that her plea was free and voluntary. CP 19. Her attorney also signed the plea form reciting that he had read and discussed the statement with her and indicating his belief that

she fully understood the statement. CP 19.

At sentencing, the trial court pronounced a sentence of 96 months. CP 22. Although the exceptional sentence provision of the Judgment and Sentence is cross out and initialed by the parties (CP 22), the trial court did enter Findings of Fact and Conclusions of Law Re: Exceptional Sentence. CP 104. The trial court found that Pangelinan had knowingly and voluntarily entered her plea with full knowledge of the consequences of the plea. CP 104-107. Significantly, the trial court concluded that Pangelinan had agree that "the facts and circumstances of her offense justified a departure from the sentencing guidelines and constitute a basis to impose a sentence above the standard range." CP 108. The trial court considered the aggravator that the offense was significantly more serious than the usual case and noted in particular that the excessive injuries were the amputation of a leg and permanent blindness. CP 108.

Some months later, on November 14, 2016, Pangelinan filed a motion to withdraw her plea. CP 32. That motion was later amended. CP 55. Pangelinan supported the motion with a declaration. CP 52. The motion was heard on February 10, 2017. RP, 2/10/17, 1. The trial court denied the motion. RP, 2/10/17, 37.

Pangelinan appealed after the trial court's denial of her motion to withdraw her guilty plea. CP 109. That Notice of Appeal, filed nearly 11

months after the judgment was entered, also purports to appeal the judgment and sentence and the imposition of an exceptional sentence. CP 109. Indeed, in the present appeal, Pangelinan makes no argument with regard to the trial court's denial of her motion to withdraw her plea. In fact, appellate counsel asserts that she "appeals all portions of her March 25, 2016 sentencing…" Brief at 7.

III. STATE'S MOTION TO DISMISS APPEAL

Pursuant to RAP 10.4(d), the state hereby brings this motion to dismiss the present appeal as untimely; as required, if granted this motion would preclude the hearing of the case on the merits.

Pangelinan was sentenced on March 25, 2016 and judgment and sentence were entered that day. CP 21; RP, 3/25/16. Her post-conviction motion was denied on February 10, 2017. RP, 2/10/17, 37. Pangelinan filed her notice of appeal on February 10, 2017; 322 days after judgment in the case was entered. This appeal is untimely.

Rule of Appellate Procedure (RAP) 5.2(a) provides that "a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section e." Section e

allows Pangelinan to file an appeal of the trial court's decision on the post-conviction motion within 30 days of that order but does not address timing after judgment. Moreover, it is doubtful that section e applies: it was not a motion in arrest of judgment or for new trial but, rather, styled as a motion to withdraw her plea. If a motion to withdraw a plea under CrR 4.2 is brought after judgment, it becomes a motion for relief from judgment under CrR 7.8. CrR 4.2(f). In any event, RAP 5.2(e) does not address either CrR 4.2 or CrR 7.8.

A decision on a CrR 7.8 motion may be appealed under RAP 2.2(10) as a ruling on a motion to vacate or under 2.2(13) as an order affecting a substantial right. *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002).[2] In that case, Gaut had pled guilty to rape of a child and child molestation. 111 Wn. App. at 876. Appeal was taken from an order denying a motion to withdraw a plea. 111 Wn. App. 875, 876, 46 P.3d 832 (2002). The Court of Appeals framed the issue:

> But the assignments of error and argument set out in James Gaut's brief have nothing to do with the denial of his motion to withdraw the plea. They focus instead on the underlying and unappealed judgment and sentence. And the time for direct appeal on both has long since run. We therefore dismiss the appeal.

Id. Gaut did not appeal the original sentencing. Id. at 879. Gaut argued

[2] Several decision under the same name are in the reports, unpublished, on Gaut's personal restraint petition; those decisions do not change the result.

"various errors to the underlying judgment and the conduct of the plea hearing" on appeal. Id.

The Court of Appeals noted that an appeal may be taken from a guilty plea on grounds of invalid statute, sufficiency of the information, jurisdiction of the court, or the circumstances of the plea. 111 Wn. App. at 880. But Gaut's "assignments of error here, however, are to the underlying judgment and sentence." Thus

> The assignments of error are then precluded from collateral review because no appeal was taken from the judgment and sentence. This is because a conviction may not be collaterally attacked upon a nonconstitutional ground that could have been raised on appeal but was not.

Id. at 880 (internal citation omitted). Although the denial of the post-judgment motion was appealable "our scope of review is limited to the trial court's exercise of discretion in deciding the issues that were raised by the motion." Id. at 881; *see also In re Sorenson,* __Wn. App. __, 403 P.3d 109 (2017) (time to file personal restraint petition runs from mandate not from remand to correct scrivener's error).

The present case is very nearly the same as the *Gaut* case. Long after the time to appeal the original judgment in the case has expired, Pangelinan attempts to bootstrap a denied motion in arrest of judgment into the right to appeal that original judgment. She asserts no argument that challenges the trial court's exercise of discretion on the post-

conviction motion. The present appeal is untimely and should be dismissed.

IV. ARGUMENT

A. THE EXCEPTIONAL SENTENCE WAS PROPERLY IMPOSED AND COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROPER PROCEDURE USED IN IMPOSING THE EXCEPTIONAL SENTENCE.

Pangelinan claims that the trial court erred in supporting the imposition of an exceptional sentence with facts that she claims were neither found by stipulation nor found by a trier of fact beyond a reasonable doubt. She asserts both that the failure of defense counsel to object to the use of those facts constitutes ineffective assistance of counsel and that the trial court abused its discretion in using those same facts. This claim is without merit because Pangelinan stipulated that an exceptional sentence served the interests of justice and that there are sufficient facts to support the exceptional sentence. Moreover, defense counsel, as the broker of that plea agreement, was aware of the stipulation and the stipulation's scope and accordingly there was no deficient performance.

A sentencing court may depart from the standard range "if it finds, considering the purpose of this chapter, that there are substantial and

compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Facts supporting an aggravated sentence must be found by a jury beyond a reasonable doubt "unless the defendant stipulates to the aggravating facts." RCW 9.94A.537(3). Further, there need not be a jury finding if the parties stipulate "that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act." RCW 9.94A.535(2)(a). Upon such a jury finding or stipulation, the sentencing court may sentence the offender up to the statutory maximum for the offense so long as the sentencing court has considered the purposes of the SRA and found substantial and compelling reasons. RCW 9.94A.537(6).

One fact that constitutes substantial and compelling reasons for an upward departure is that "[t]he victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." RCW 9.94A.535(3)(y). The imposition of a sentence that departs from the standard range may be reversed only if the reviewing court finds

> (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4). This provision propounds three questions and

varying standards of review:

> (1) Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous. (2) Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law. (3) Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

State v. Fisher, 188 Wn. App. 924, ¶55, 355 P.3d 1188 (2015).

Applying the above principles to the present case it can be seen that there are two primary areas of concern: whether the trial court had sufficient reason and facts to support the sentence and whether the trial court abused its discretion in the length of sentence it imposed. Neither area is applied in error in the present case.

First, the statute plainly allows the trial court to impose an exceptional sentence in the circumstances of this case. RCW 9.94A.535(2)(a) gives the trial court the power to impose an exceptional sentence "without a finding of fact by a jury." Here, Pangelinan's plea agreement stipulation tracks the language of section .535(2)(a); she agreed with the state that the interests of justice is best served by the imposition of an exceptional sentence outside the standard range. By the plain language of that statutory provision, upon Pangelinan's agreement, the trial court was not required to assure that the any particular fact was found beyond a reasonable doubt. Moreover, in the same provision of the same

plea agreement, Pangelinan added the arguably unnecessary agreement that there is a factual basis to impose an exceptional sentence. Thus, Pangelinan conceded both the trial court's authority to sentence outside the standard range and that facts exist to support such a departure.

Under the statutory scheme, then, Pangelinan's plea agreement stipulation provided the trial court with the reason for and justification of the exceptional sentence. No more is required and the inquiry should move to the length of sentence. However, there is more: along with the interests of justice stipulation, Pangelinan's plea statement included an exact quote of the language of RCW 9.94A.535(3)(y) and thereby her clear admission that an exceptional sentence is warranted because the injuries she caused substantially exceeded the level of bodily injury necessary to prove the crime. This admission thus provided the trial court with a second reason supported by the record to impose an upward departure and supplied the facts necessary to justify such a departure (recalling here that Pangelinan stipulated that there is a factual basis). Thus the first two questions on review are answered affirmatively: the trial court had both lawful reasons and justification by Pangelinan's stipulation and by her admission.

Under these circumstances, all that should remain is the question of the length of the sentence. In exercising it's the discretion on this

aspect of the test, it is not in the least improper for the trial court to inquire about and consider the actual injuries that substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. It is difficult to see how this would not be the case when Pangelinan twice expressly admitted that such facts exist. Moreover, the notion that she did not know the extent of those injuries when she made her admissions stretches credulity too far. She clearly knew of the amputation and blindness before she stipulated and admitted that those facts exist.

Further, under the heading of "substantial and compelling," even with the stipulations and admissions in the record, it fell to the trial court to determine whether the injuries sustained did in fact "substantially exceed the level of bodily injury." Otherwise Pangelinan would likely be here on appeal claiming that the trial court erred by not ascertaining whether or not the injuries involved in this case fit the bill. Here, the minimum harm required for a conviction is "substantial bodily harm." RCW **. That phrase is defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). But here the victim suffered permanent loss of his leg and permanent loss of his site. This clearly "substantially exceeds" the definition of

substantial bodily harm." In fact, it meets the definition of "great bodily harm," which obtains when an injury "causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c); *see State v. Pappas*, 176 Wn.2d 188, 193, 289 P.3d 634 (2012) (En banc).

Having been provided with reasons and justification for the exceptional sentence, "The trial court has all but unbridled discretion in fashioning the structure and length of an exceptional sentence." *State v. France*, 176 Wn. App. 463, 470, 308 P.3d 812 (2013) (internal quotation and cite omitted) *review denied* 179 Wn.2d 1015 (2014). As noted above, the statute provides that once correct grounds for a departure are extant, the trial court may sentence up to the statutory maximum for an offense. RCW 9.94A.537(6). Moreover, once the reasons for the departure are established, the trial court is not required to articulate its reasons for the length of the exceptional sentence; "[t]here is no such statutory requirement as to the *length* of an exceptional sentence." *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995)(emphasis by the court).

Under the abuse of discretion standard that applies to the "clearly excessive" inquiry, "[a] sentence is clearly excessive if it is based on untenable grounds or untenable reasons or if it is an action no reasonable

judge would have taken." *State v. Sao*, 156 Wn. App. 67, 80, 230 P.3d 277 (2010), *citing State v. Branch*, 129 Wn.2d 635, 649–650, 919 P.2d 1228 (1996). In the present case, the trial court was confronted with injuries that *vastly* exceed those necessary to prove the offense. Considering a large upward departure in light of the loss of a leg and the loss of site seems on its face to not be untenable or unreasonable. Any judge given the authority to depart by stipulation of the parties would be hard pressed not depart as the present court did. There was no abuse of discretion.

And since the trial court acted lawfully and did not abuse its discretion, defense counsel was not ineffective for raising an objection to this proper procedure. Pangelinan has the burden of proving that counsel provided ineffective assistance and must "overcome a strong presumption that counsel's performance was reasonable." *State v. Breitung*, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011). She must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the sentencing context, the test regarding prejudice is "but for…counsel's deficient performance, there is a reasonable probability that [the] sentence would have differed." *State v. Calhoun*, 163 Wn. App. 153, 168, 257 P.3d 693 (2011) *review denied* 173 Wn.2d 1018 (2012).

As counsel's declaration attests, he worked closely with Pangelinan in negotiating the disposition of the case. CP 79-82. In particular, counsel states that he and Pangelinan expressly discussed the state's offer of an exceptional sentence of 24 months and discussed that the trial court was not bound by that recommendation and could sentence her up to the statutory maximum of 10 years. CP 81. Thus counsel performed as expected in negotiating the case and advising Pangelinan of the risks involved with the state's offer. Counsel clearly knew that the exceptional sentence stipulation, without more, would allow the trial court to sentence up to 10 years. This advice is correct under RCW 9.94A.537.

Defense counsel knew that the trial court was not bound by the 24 month recommendation of the parties. Counsel knew the facts that were being referred to when he and his client stipulated to a factual basis for the exceptional sentence. Counsel knew the facts referred to when Pangelinan admitted that she had caused substantially more harm than necessary to prove the crime. Counsel knew that the stipulation and admission gave the trial court relatively unbridled discretion in fashioning the exceptional sentence. His objection to the facts that caused Pangelinan's stipulation and admission would have been to no accord. Counsel and Pangelinan came to sentencing with open eyes. There was no deficient performance.

Finally, nothing in this record shows that any sort of objection

would have changed the trial court's view of the case. The trial judge, as he should, knew the facts of the offense that he was sentencing. Nothing counsel could have said would have changed the trial court's view of the case. And it is that view of the case that resulted in the sentence. There is no reasonable possibility that the trial court would have done otherwise and thus no prejudice.

Counsel was not ineffective and the trial court did not abuse its discretion. This claim fails.

B. THE CASE SHOULD BE REMANDED WITH ORDERS TO STRIKE THE FORFEITURE PROVISION FROM THE JUDGMENT AND SENTENCE.

Pangelinan next claims that the trial court erred by ordering that all seized property referenced in the discovery be forfeited. This is a meritorious claim.

In conceding the point, the state will note that Hughes makes no assertion that any of her property was improperly forfeited. Only by exalting form over substance is Hughes an "aggrieved party." RAP 3.1. An aggrieved party is "one whose personal right or pecuniary interests have been affected." *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003). But it has been held that a person need not be aggrieved in order to prevail on this issue. *See State v. Rivera*, 198 Wn. App. 128, 392 P.3d

1146 (2017).

The state concedes that present authority requires deletion of the present forfeiture provision. This should be done in the manner of a remand to correct a scrivener's error. "Where only corrective changes are made to a judgment and sentence by a trial court on remand, there is nothing to review on appeal." *In re Sorenson*, __Wn. App. __, 403 P.3d 109 (2017). This being a ministerial action that allows for no discretion on the part of the trial court, a new sentencing hearing is not required. Id.

V. CONCLUSION

The matter should be dismissed as untimely. If not untimely, for the foregoing reasons Pangelinan's conviction and sentence should be affirmed.

DATED November 9, 2017.

Respectfully submitted,

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